NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JEROME BANNISTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Chantel R. Doakes
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTION PRESENTED FOR REVIEW

Does a Florida robbery conviction categorically require the use of "violent force" as defined in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) due to its "overcoming resistance" element, if that element can be satisfied by such minor conduct as bumping the victim, unpeeling the victim's fingers to take money from his hand, or engaging in a tug-of-war over a purse?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

No:

JEROME BANNISTER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Jerome Bannister respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-10483-D in that court on October 27, 2017, which denied his motion for a certificate of appealability.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which denied Petitioner's motion for a certificate of appealability, is contained in the Appendix (A-1). The district court's order denying Petitioner's 28 U.S.C. § 2255 motion to vacate sentence and denying Petitioner a certificate of appealability is unreported and reproduced in Appendix A-2.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 27, 2017. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

(e)(2) As used in this subsection – . . .

> **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , that –
>
> **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another.

Fla. Stat. § 812.13. Robbery (1989)

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree . . .

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree . . .

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree . . .

(3)(a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

(b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

STATEMENT OF THE CASE

Mr. Bannister was charged with being a previously convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1) and § 924(e)(1). He pled guilty to that charge, and on November 13, 2009, was sentenced to 180 months imprisonment as an Armed Career Criminal. His ACCA enhancement was predicated upon three Florida convictions: a 1995 conviction for robbery, a 1995 conviction for robbery with a deadly weapon; and a 2001 conviction for lewd or lascivious battery and resisting arrest with violence.

On June 22, 2016, after this Court's decision in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015) declaring the ACCA's residual clause unconstitutionally vague, Mr. Bannister moved to vacate his sentence under 28 U.S.C. § 2255. In it he argued that his Florida robbery convictions no longer qualified as ACCA predicates without the residual clause, and without those convictions as qualifiers his enhanced ACCA sentence could not stand. The motion was referred to a magistrate judge for a report and recommendation ("R&R").

On November 16, 2016, United States Magistrate Judge Hunt issued his R&R that the district court deny Mr. Bannister's petition, finding that Mr. Bannister's pre-1997 Florida robbery convictions still qualified as violent felonies under the ACCA's elements clause. Mr. Bannister filed timely objections to the R&R. On December 22, 2016, the district court issued an order adopting the R&R, denying the § 2255 motion, and further denying Mr. Bannister's request for a certificate of appealability (COA).

On February 2, 2017, Mr. Bannister filed an application for a COA with the Eleventh Circuit, requesting a COA on the issue of whether his 1995 Florida robbery convictions qualified under the ACCA's elements clause because at the time of his convictions robbery could be committed by mere snatching. In his application, Mr. Bannister noted that reasonable jurists were actually debating whether a pre-1997 Florida robbery conviction has as an element of the use of violent force. Mr. Bannister's motion argued that pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000), a certificate of appealabilty should issue when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."

On October 27, 2017, a single Eleventh Circuit judge denied a COA in an order that stated in summary fashion that Mr. Bannister had failed to make a substantial showing of the denial of a constitutional right.

REASON FOR GRANTING THE WRIT

The Eleventh Circuit and Ninth Circuits have sharply disagreed over whether a Florida robbery conviction categorically qualifies as a "violent felony" within the ACCA's elements clause, and these courts are part of a broader circuit conflict over whether a state robbery offense that includes the common law requirement of "overcoming victim resistance" can qualify as a "violent felony" if it has been interpreted by state appellate courts to require only slight force.

The question of whether state robbery convictions necessarily have *violent* force "as an element" was not a pressing question for this Court when the ACCA's residual clause remained in existence. Many circuits, including the Eleventh, had easily concluded that the residual clause extended to categorically non-violent crimes due to the mere "risk" of physical injury during a robbery, or in its aftermath. In that vein, the Eleventh Circuit had held in *United States v. Welch*, 683 F.3d 1304 (11th Cir. 2012), that even a robbery by "sudden snatching," a crime which – by definition – requires no more force than that necessary to snatch money or an item from the victim's hand, and neither victim resistance nor injury, was nonetheless a "violent felony" and proper ACCA predicate within the residual clause because "[s]udden snatching ordinarily involves substantial risk of physical injury to the victim." *Id.* at 1313.

Once this Court eliminated the residual clause as the easiest route to an ACCA enhancement in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015), however, lower courts have had to reconsider whether state robbery offenses – long counted as "violent felonies" within the residual clause, or within the elements clause before this Court clarified the meaning of "physical force" as "*violent* force" in

Curtis Johnson v. United States, 559 U.S. 133, 141 (2010), or the categorical approach in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *Descamps v. United States*, 133 S.Ct. 2276 (2013): and *Mathis v. United States*, 136 S.Ct. 2243 (2016) – would qualify as "violent felonies" under these intervening precedents.

Several circuit courts have clearly risen to that task. Specifically, the Fourth, Sixth, and Ninth Circuits have carefully re-examined their prior elements clause robbery precedents. They have strictly applied the dictates of the now-clarified categorical approach; carefully conducted the now-mandated threshold "divisibility" inquiry, *Mathis*, 136 S.Ct. at 2256; sought out the appropriate state courts' interpretation of the elements of their robbery offenses as mandated by *Curtis Johnson*, 559 U.S. at 138, and *Mathis*, 136 S.Ct. at 2256; determined from relevant state decisions the minimum conduct necessary for conviction as required by *Moncrieffe*, 133 S.Ct. at 1680; and concluded that at least five state robbery offenses are not categorically ACCA "violent felonies." *See, e.g.*, *United States v. Geozos*, 870 F.3d 890, 800-901 (9th Cir. Aug. 29, 2017)(Florida statutory robbery); *United States v. Yates*, 866 F.3d 723, 728-733 (6th Cir. 2017)(Ohio statutory robbery); *United States v. Gardner*, 823 F.3d 793, 801-804 (4th Cir. 2016)(North Carolina common law robbery); *United States v. Winston*, 850 F.3d 677, 682-686 (4th Cir. 2017)(Virginia common law robbery); *United States v. Parnell*, 818 F.3d 974, 978-981 (9th Cir. 2016) (Massachusetts armed robbery).

The Eleventh Circuit, however, has not followed this course. Instead, as set forth below, the Eleventh Circuit has blindly followed its pre-*Moncrieffe* precedents,

and refused to even consider Florida law to determine the least culpable conduct for a robbery conviction. That approach has placed the Eleventh Circuit in direct conflict with the Ninth on Florida robbery specifically; and with the Fourth and Sixth Circuits more broadly – as those courts have considered analogous robbery offenses with the common law "overcoming resistance" element, and confirmed from the relevant state caselaw that overcoming resistances does *not* invariably necessitate violent force.

For the reasons set forth below, these conflicts are intractable, and to allow them to persist is untenable. This Court is being flooded with petitions challenging the Eleventh Circuit's adverse ruling on the issue, and with every succeeding day more and more Eleventh Circuit defendants are being forced to serve draconian ACCA sentences that similarly-situated defendants in other circuits do not serve. The Court's intervention is urgently needed.

A. The Eleventh and Ninth Circuits are intractably divided on whether a Florida robbery conviction categorically requires "violent force."

The Eleventh Circuit has repeatedly held (without reviewing ***any*** Florida appellate decisions) that simply ***because*** Florida robbery requires overcoming "victim resistance," the offense is categorically an ACCA violent felony. *See United States v. Seabrooks,* 839 F.3d 1326, 1340-1341, 1346, 1352 (11th Cir. 2016)(separate decisions by Hull, Baldock, and Martin, JJ.) (narrowly agreeing that *Seabrooks'* 1997 Florida robbery conviction was a "violent felony" according to *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011) since *Seabrooks'* conviction post-dated the

Florida Supreme Court's decision in *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997) which clarified that a Florida robbery offense requires overcoming victim resistance); *United States v. Fritts*, 841 F.3d 937, 940-944 (11th Cir. 2016) (following not only *Lockley* but its even earlier "precedent," *United States v. Dowd*, 451 F.3d 1244, 1255 (11th Cir. 2006), to hold that all Florida robbery convictions, including those before *Robinson*, categorically qualify as ACCA "violent felonies" since *Robinson* clarified what the Florida robbery statute "always meant").

In both *Seabrooks* and *Fritts*, the appellants informed the Eleventh Circuit in their briefing that Florida caselaw made clear that overcoming "resistance" did *not* require violent force in every case. They urged the Eleventh Circuit to specifically consider Florida decisions like *Sanders v. State*, 769 So.2d 506, 507-508 (Fla. 5th DCA 2000) which confirmed *violent* force was not necessary to overcome resistance where the resistance itself was slight. *See, e.g*, Reply Brief of the Appellant in *United States v. Seabrooks*, 2016 WL 137 *See, e.g.*5906 at **14-15 (11th Cir. March 4, 2016); Reply Brief of the Appellant in *United States v. Fritts*, 2016 WL 3136766 at *18 (11th Cir. June 2, 2016).

Both *Seabrooks* and *Fritts* argued that the analysis in *Lockley* and *Dowd* had been abrogated by this Court's intervening precedents in *Descamps*, *Moncrieffe*, and *Mathis*. But in *Seabrooks*, the Eleventh Circuit reflexively adhered to its prior precedent in *Lockley*, and ignored the appellant's argument that *Lockley*'s analysis had not survived the Court's clarification of the categorical approach in *Moncrieffe*, *Descamps*, and *Mathis*. And thereafter in *Fritts*, the Eleventh Circuit not only

followed *Lockley*, but *Dowd*, which had demonstrably misapplied the "modified categorical approach" and contained no other analysis. In *Seabrooks* and *Fritts*, the Eleventh Circuit steadfastly refused to review ***any*** Florida caselaw – deferring completely to its prior precedents in *Lockley* and *Dowd* which preceded *Moncrieffe*, and did not consult Florida law to determine the least culpable conduct for conviction.

In *United States v. Geozos*, 870 F.3d 890 (9th Cir. Aug. 29, 2017), however, the Ninth Circuit was asked to consider the same question as in *Seabrooks* and *Fritts* – whether a Florida robbery conviction categorically qualified as an ACCA violent felony. And analyzing the identical issue on a clean slate, consistently with the dictates of *Moncrieffe* and *Mathis*, the Ninth Circuit concluded that a Florida robbery conviction did ***not*** categorically qualify as an ACCA violent felony since Fla. Stat. § 812.13(1) – by its text, and as interpreted by the Florida courts – did *not* require the use of "violent force." *Id.* at 900.

First, the Ninth Circuit found significant that "force" and "violence" were used separately in § 812.13(1), which suggested "that not all 'force' that is covered by the statute is 'violent force.'" *Id.* That, in and of itself, led the Ninth Circuit to "doubt whether a conviction for violating section 812.13 qualifies as a conviction for a 'violent felony." *Id.* But ultimately, it was Florida caselaw (ignored by the Eleventh Circuit) that made it clear to the Ninth Circuit that "one can violate section 812.13 without using violent force." *Id.* The Ninth Circuit acknowledged that according to *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997), a conviction under

Fla. Stat. § 812.13(1) requires that there "be resistance by the victim that is overcome by the physical force of the offender." *Id.* at 886. However, the Ninth Circuit pointed out, Florida caselaw both prior and subsequent to *Robinson* confirmed that "the amount of resistance can be minimal," and therefore, that one could violate § 812.13 "without using violent force." *Id.*

For instance, the Ninth Circuit noted with significance, prior to *Robinson* in *Mims v. State*, 342 So.2d 883, 886 (Fla. 3rd DCA 1977), a Florida appellate court had held that "Although purse snatching is not robbery if no more force or violence is used than necessary to physically remove the property from a person who does not resist, if the victim does resist *in any degree* and this resistance is overcome by the force of the perpetrator, the crime of robbery is complete." *Geozos*, 870 F.3d at 900 & n. 9 (adding the emphasis to the words "*in any degree*" in *Mims* and noting that *Mims* was "cited with approval in *Robinson*").

And after *Robinson*, the Ninth Circuit also found significant, in *Benitez-Saldana v. State*, 67 So.3d 320, 323 (Fla. 2nd DCA 2011) another Florida appellate court had held that a robbery conviction "may be based on a defendant's act of engaging in a tug-of-war over the victim's purse." In the Ninth Circuit's view, such an act "does not involve the use of violent force within the meaning of the ACCA;" rather, it involves "something less than violent force within the meaning of *Johnson I*." *Geozos*, 870 F.3d at 900 (citing *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017)).

The Ninth Circuit acknowledged that its conclusion that a Florida robbery offense was not categorically an ACCA "violent felony" put it "at odds" with the Eleventh Circuit, which held just the opposite in *Lockley* and *Fritts*. But in the Ninth Circuit's view, *Lockley* and *Fritts* were unpersuasive since they overlooked the crucial point – confirmed by Florida caselaw – that violent force is unnecessary to "overcome resistance" in Florida. The Ninth Circuit explained:

> [W]e think the Eleventh Circuit, in focusing on the fact that Florida robbery requires a use of force sufficient to overcome the resistance of the victim, has overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily violent force. *See Montsdoca v. State*, 84 Fla. 82, 93 So. 157, 159 (Fla. 1922) ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.")

Geozos, 870 F.3d at 901. For that reason, the Ninth Circuit held, a Florida robbery conviction was not a proper ACCA predicate. Accordingly, it reversed the lower court's erroneous denial of Geozos' § 2255 motion, and ordered that Geozos' ACCA sentence be vacated and he be released from his illegal custody.[1]

As is clear from *Geozos*, the Ninth and Eleventh Circuits are now directly in conflict on an important and recurring question of Federal law. The conflict is

---

1 The *Geozos* court correctly found that whether a Florida robbery was armed or unarmed made no difference because an individual may be convicted of armed robbery for "merely carrying a firearm" during the robbery, even if the firearm is not displayed and the victim is unaware of its presence. 870 F.3d at 900-901. That ruling was consistent with *State v. Baker*, 452 So.2d 927, 929 (Fla. 1984). Notably, the same point was made to the Eleventh Circuit by the defendants in both *Seabrooks* and *Fritts*, and neither panel disputed it. Rather, the Eleventh Circuit found in both cases that the defendants' armed robbery convictions qualified as "violent felonies," because their underlying *unarmed* robbery offenses categorically qualified as "violent felonies." It is thus of no legal moment here that Mr. Bannister was convicted of armed robbery.

demonstrably intractable at this point, and it will not be resolved without the Court's intervention. Notably, in decision after decision since *Fritts*, the Eleventh Circuit – which applies its "prior panel precedent rule" rigidly – has reflexively adhered to *Fritts*. Not only in Mr. Bannister's case, but in multiple other cases as well, the Eleventh Circuit has affirmed ACCA sentences predicated upon Florida robberies based upon *Fritts*.

As of this writing, certiorari has been sought in multiple Eleventh Circuit cases challenging *Fritts*' holding that a Florida robbery conviction categorically requires "violent force." After the Ninth Circuit issued its decision in *Geozos* – rejecting the view set forth in *Fritts* – the Court directed the Solicitor General to respond to pending petitions for certiorari in two Eleventh Circuit ACCA cases following *Fritts*. *See Denard Stokeling v. United States* (No. 17-5554), and *Kenneth Conde v. United States* (No. 17-5772). And notably, after these two responses were ordered, the Solicitor General itself agreed that responses were warranted in two other ACCA cases predicated upon Florida robbery convictions, *Latellis Everette v. United States* (No. 17-6054), and *Anthony Williams v. United States* (No. 17-6026).

In *Everette*, notably, the appellant filed a request for an initial en banc hearing with the hope that the Eleventh Circuit would reconsider *Fritts*' holding that all Florida robbery offenses categorically qualify as ACCA "violent felonies." But not one judge in active service on the court voted for en banc consideration, and Everette's request was summarily denied. *United States v. Everette*, Slip op. (11th Cir. July 31, 2017).

Even after the Ninth Circuit harshly criticized the Eleventh Circuit in *Geozos* and reached a conflicting result on precisely the same predicate – and several appellants urged the Eleventh Circuit to follow Florida law as the Ninth Circuit did in *Geozos* – the Eleventh Circuit continued to disregard Florida law, and rigidly adhere to *Fritts*. *See Repress v. United* States, ___ Fed. Appx. ___, 2017 WL 4570661 (11th Cir. Oct. 13, 2017); *United States v. Pace*, ___ Fed. Appx. ___, 2017 WL 4329718 (11th Cir. Sept. 29, 2017).[2]

With this spate of recent decisions, the Eleventh Circuit has made undeniably clear that its conflict with the Ninth Circuit is intractable. The Eleventh Circuit will not reconsider whether a Florida robbery offense categorically requires the *Curtis Johnson* level of violent force. And notably, the circuit conflict actually extends much farther than the Ninth and Eleventh Circuits.

B. The Ninth and Eleventh Circuits are part of a broader circuit conflict on whether the common law "overcoming resistance" element in a robbery offense can categorically require *violent* force, if relevant state decisions confirm resistance may be overcome by only slight, non-violent force.

Notably, in permitting a conviction for robbery based on the use of force so long as the degree of force used is sufficient to overcome a victim's resistance, *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), Florida is like the majority of states. At least fifteen states have now expressly included some variation of this standard in

---

2 Petitions for writ of certiorari were filed in both *Repress*, 17-7391 and *Pace*, 17-7140.

the text of their statutes,[3] and many others (including Florida, North Carolina, Virginia, Colorado, and Ohio) have judicially recognized an "overcoming resistance" element through their caselaw.[4]

As has been detailed in several petitions for certiorari now pending before this Court, *see, e.g., Harris v. United States*, No. 16-8616; *Stokeling v. United States*, No. 17-5554; and *Conde v. United States*, No. 17-5772, this widely-applied requirement of "victim resistance" in state robbery offenses has deep roots in the common law. Common law robbery had an element labeled "violence," but the term "violence" did ***not*** imply a "substantial degree of force." The general rule at common law was that the degree of force used was "immaterial," so long as it compelled the victim to give up money or property.

In this vein, the Florida appellate courts, notably, have long recognized that the unarmed robbery offense originally described in Fla. Stat. § 812.13(1) ***was*** common law robbery. *See Montsdoca v. State*, 84 Fla. 82, 86 (1922) (reiterating the common law rules that "[t]here can be no robbery without violence, and there can be

---

3 *See* Ala. Code § 13A-8-43(a)(1); Alaska Stat. § 11.41.510(a)(1); Ariz. Rev. Stat. §§ 13-1901, 1902; Conn. Gen. Stat. § 53a-133(1); Del. Code Ann. tit. 11, § 831(a)(1); Haw. Rev. Stat. § 708-841(1)(a); Me. Rev. Stat. tit. 17-A, § 651(1)(B)(1); Minn. Stat. § 609.24; Mo. Rev. Stat. §§ 570.010(13), 570.025(1); Nev. Stat. § 200.380(1)(b); N.Y. Penal Law § 160.00(1); Okla. Stat. tit. 21, §§ 791, 792, 793; Or. Rev. Stat. § 164.395(1)(a); Wash. Rev. Code § 9A.56.190; Wis. Stat. § 943.32(1)(a).

4 *See, e.g., Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989); *State v. Stecker*, 108 N.W2d 47, 50 (S.D. 1961); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. 1997); *West v. State*, 539 A.2d 231, 234 (Md. 1998); *State v. Blunt*, 193 N.W.2d 434, 435 (Neb. 1972); *State v. Sein*, 590 A.2d 665, 668 (N.J. 1991); *Winn v. Commonwealth*, 462 S.E.2d 911, 913 (Va. 1995); *People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996); *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000); *State v. Juhasz*, 2015 WL 5515826 at *2 (Ohio Ct. App. 2015).

no larceny with it," and that "the degree of force used is immaterial"); *State v. Royal*, 490 So.2d 44, 45-46 (Fla. 1986) (acknowledging that "the common law definition of robbery" was "set forth in subsection (1)). As the Florida Supreme Court expressly recognized in *Royal*, the requirement in § 812.13(1) that the taking be by "force, violence, assault, or putting in fear" not only derived from the common law, but the Court had thereafter interpreted that provision "consistent with the common law." *Id.* at 46 (citing *Williams v. Mayo*, 126 Fla. 871, 875, 172 So. 86, 87 (1937)).

The only change to the common law robbery offense incorporated into that statutory provision occurred immediately after – and in response to – *Royal*, when the Florida Legislature broadened the statutory offense to include the use of "force" not only during a taking, but after it as well. *See, e.g., Foster v. State*, 596 So.2d 1099, 1107-1108 (Fla. 5th DCA 1992). Other than that, however, there has been no change to the underlying "common law definition of robbery set forth in subsection (1)," *Royal*, 490 So.2d at 46, to this day.

Given that the "overcoming resistance" element in Florida robbery derives from the common law and has been interpreted consistently with the common law, the conflict described above extends much further than the Ninth and Eleventh Circuits. Notably, the Fourth Circuit has now recognized that both North Carolina common law robbery and Virginia common law robbery can be committed without violent force and are not proper ACCA predicates for that reason. And the Sixth Circuit has held similarly, with regard to Ohio statutory robbery, which – like Florida statutory robbery – is modeled on common law robbery.

In *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2015), the Fourth Circuit held that the offense of common law robbery by "violence" in North Carolina did not qualify as a "violent felony" under the ACCA's elements clause because it did not categorically require the use of "physical force." 823 F.3d at 803-804. In reaching that conclusion, however, the Fourth Circuit did not simply rely upon common law principles. Rather, consistent with the categorical approach as clarified by this Court in *Moncrieffe*, *Descamps*, and *Mathis*, the court thoroughly reviewed North Carolina appellate law to determine the least culpable conduct for a North Carolina common law robbery conviction. And notably, it was only after its thorough survey of North Carolina law, that the Fourth Circuit concluded that a North Carolina common law robbery by means of "violence" may be committed by any force "sufficient to compel a victim to part with his property," and that "'[t]he degree of force used is immaterial.'" *Id.* (quoting *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944)). In fact, the Fourth Circuit noted, *Sawyer*'s definition "suggests that even *de minimis* contact can constitute the 'violence' necessary for a common law robbery conviction under North Carolina law." *Id.* (emphasis in original).

The Fourth Circuit discussed two supportive North Carolina appellate decisions in detail. *Id.* (discussing *State v. Chance*, 662 S.E.2d 405 (N.C. Ct. App. 2008), and *State v. Eldridge*, 677 S.E.2d 14 (N.C. Ct. App. 2009)). In *Chance*, the Fourth Circuit noted, a North Carolina court had upheld a robbery conviction where the defendant simply pushed the victim's hand off a carton of cigarettes; that was sufficient "actual force." And in *Eldridge*, a different court upheld a robbery

conviction where a defendant merely pushed the shoulder of a store clerk, causing her to fall onto shelves while the defendant took possession of a TV. Based on those decisions, the Fourth Circuit concluded that "the minimum conduct necessary to sustain a conviction for North Carolina common law robbery" does not necessarily require "physical force," and that the offense does not categorically qualify as a "violent felony" under the elements clause. *Id.*[5]

Thereafter in *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017), the Fourth Circuit held that a conviction for Virginia common law robbery, which may be committed by either "violence or intimidation," does not qualify as a "violent felony" within the ACCA's elements clause since – as confirmed by Virginia caselaw – such an offense can be committed by only slight, non-violent force. *Id.* at 685.

The Fourth Circuit acknowledged in *Winston* that prior to *Curtis Johnson*, it had held that a Virginia common law robbery conviction qualified as a "violent felony" within the elements clause. However, citing *Gardner*, the Fourth Circuit rightly found that such precedent was no longer controlling after (1) this Court in *Curtis Johnson* not only redefined "physical force" as "violent force" but made clear

---

5 Although the Fourth Circuit did not discuss *State v. Robertson*, 531 S.E.2d 490 (N.C. Ct. App. 2000) in *Gardner*, the government had discussed *Robertson* in in its *Gardner* brief, and had correctly described *Robertson* as holding that mere "purse snatching" does not involve sufficient force for a common law robbery conviction in North Carolina. Brief of the United States in *United States v. Gardner*, No. 14-4533 at 46-49, 53 (4th Cir. Aug. 21, 2015). *Robertson* had expressly recognized that North Carolina followed "'[t] rule prevailing in most jurisdictions" that "'the force used . . . must be of such a nature as to show that it was intended to *overpower the party robbed or prevent his resisting, and not merely to get possession of the property stolen.*'" *Id.* at 509 (quoting *State v. John*, 50 N.C. 163, 169 (1857)(emphasis added by *Robertson*)). The Fourth Circuit in *Gardner* was undoubtedly aware from *Robertson* that North Carolina robbery required overcoming victim resistance.

that federal courts applying the categorical approach were bound by the state courts' interpretation of their own offenses, and (2) in *Moncrieffe* "instructed that we must focus on the 'minimum conduct criminalized' by state law." *Id.* at 684.

Consistent with these intervening precedents, the Fourth Circuit carefully examined for the first time in *Winston* how the Virginia state courts interpreted a robbery "by violence or intimidation." While noting that its prior decision in *Gardner* was "persuasive," the Fourth Circuit rightly acknowledged that its "conclusion that North Carolina robbery does not qualify as a violent felony" did not itself "compel a similar holding in the present case" because the court was required to "defer to the [Virginia] courts' interpretations of their own [] common law offenses." *Winston*, 850 F.3d at 685 n. 6.

Accordingly, as it had done in *Gardner*, the Fourth Circuit undertook a thorough survey of Virginia appellate decisions on common law robbery. *See id.* at 684-685 (discussing in particular, and finding significant: *Maxwell v. Commonwealth*, 165 Va. 860, 183 S.E. 452, 454 (1936); *Henderson v. Commonwealth*, No. 3017-99-1, 2000 WL 1808487, at * 3 (Va. Ct. App. Dec. 12, 2000) (unpublished); and *Jones v. Commonwealth*, 26 Va. App. 736, 496 S.E.2nd 668, 670 (1998)). Citing these three decisions, the Fourth Circuit concluded that a Virginia common law robbery "by violence" requires only a "'slight' degree of violence;" that "anything which calls out resistance is sufficient;" and "such resistance by the victim does not necessarily reflect use of 'violent force.'" *Winston*, 850 F.3d at 684-685. And therefore, the Fourth Circuit expressly rejected the precise assumption made by the

Eleventh Circuit in both *Seabrooks* and *Fritts*, without considering a single Florida decision: namely, that force sufficient to overcome resistance in Florida necessarily involves *violent* force. *Winston, id.* at 683. To the contrary, the Fourth Circuit held, the "minimum conduct necessary to sustain a conviction for Virginia common law robbery does not necessarily include [] 'violent force.'" *Id.* at 685.

In *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017), the Sixth Circuit expressly aligned itself with the Fourth Circuit, in holding that the Ohio statutory robbery offense does not qualify as an ACCA violent felony, given Ohio appellate decisions confirming that a robbery by "use of force" under the statute could be accomplished by the minimal amount of force necessary to snatch a purse involuntarily from an individual, or simply "bumping into an individual." *Yates*, 866 F.3d at 730-731 (noting accord with the Fourth Circuit in *Gardner*, 823 F.3d at 803-804, where "even minimal contact may be sufficient to sustain a robbery conviction if the victim forfeits his or her property in response.") The force applied by the defendant in such circumstances, the Sixth Circuit noted, was demonstrably "lower than the type of violent force required by [*Curtis*] *Johnson*." 866 F.3d at 729.

The Sixth Circuit noted with significance that in *State v. Carter*, 29 Ohio App.3d 148, 504 N.E.2d 469 (1985), a purse snatching case, the court had affirmed a robbery conviction where the victim simply had a firm grasp of her purse, the defendant pulled it from her, and then pulled her right hand off her left hand where she was holding the bottom of the purse. *Id.* at 470-471(explaining that this simple incident involved the requisite degree of actual force, "*however*

miniscule" to constitute a robbery; citing as support *State v. Grant*, 1981 WL 4576 at *2 (Ohio Ct. App. Oct. 22, 1981), which had held that a mere "bump is an act of violence" within the meaning of the robbery statute, "even though only mildly violent, as the statute does not require a high degree of violence").

And in another Ohio purse snatching case, *In re Boggess*, 205 WL 3344502 (Ohio Ct. App. 2005), the Sixth Circuit noted, the appellate court had clarified that the "force" requirement in the Ohio robbery statute would be satisfied so long as the offender "physically exerted force upon the victim's arm so as to remove the purse from her *involuntarily*." 866 F.3d at 731 (emphasis added). In *Boggess*, the defendant simply grabbed the victim's purse, then jerked her arm back, and kept running." *Id.* at 729. Finally, in *State v. Juhasz*, 2015 WL 5515826 (Ohio Ct. App. 2015), an Ohio court confirmed that so long as there was "a *struggle* over control of an individual's purse" in any degree, that would be sufficient to establish the "element of force" in the statute. The "struggle need not be prolonged or active; the act of forcibly removing a purse from an individual's shoulder is sufficient." *Id.* at 729-730. While the *Juhasz* court did not specifically discuss the common law roots of the "struggle" concept in the Ohio robbery caselaw, that is a concept that derives directly from the common law.

Based upon the Ohio caselaw highlighted in *Yates*, the Sixth Circuit found a "realistic probability" that Ohio applied its robbery statute "in such a way that criminalizes a level of force lower than the type of force required by [*Curtis*] *Johnson*." 2017 WL 3402084 at * 5 (citing *Moncrieffe*, 133 S.Ct. at 1684). And

notably, Florida caselaw – like North Carolina, Virginia, and Ohio caselaw – likewise confirms that *violent* force is ***not*** necessary to overcome victim resistance, and commit a robbery under Fla. Stat. § 812.13(1) either. Like the North Carolina common law robbery offense addressed in *Gardner*, the Virginia common law robbery offense addressed in *Winston*, and the Ohio statutory robbery offense addressed in *Yates*, a Florida statutory robbery may also be committed by the slight force sufficient to overcome a victim's slight resistance. Indeed, as the Ninth Circuit correctly noted in *Geozos*, a simple survey of Florida's own appellate law (consistently ignored by the Eleventh Circuit) easily confirms this point.

In addition to *Mims* and *Benitez-Saldana* which were cited in *Geozos*, at least three other Florida decisions support the Ninth Circuit's conclusion that whenever a victim's resistance is slight in a Florida robbery, only slight force by the offender is necessary to overcome it and seal the conviction. In *Johnson v. State*, 612 So.2d 689 (Fla. 1st DCA 1993), for instance, a Florida appellate court found force sufficient to tear a scab off a victim's finger was enough to sustain conviction for robbery. *Id.* at 690. In *Sanders v. State*, 769 So. 2d 506 (Fla. 5th DCA 2000), another Florida appellate court affirmed a strongarm robbery conviction where the defendant merely peeled back the victim's fingers before snatching money from his hand. The court explained that the victim's "clutching of his bills in his fist as Sanders pried his fingers open could have been viewed by the jury as an act of resistance against being robbed by Sanders," thus confirming that no more resistance, or "force" than that was necessary for a strongarm robbery conviction under § 812.13(1)). *Id.* at

507-508. And in *Hayes v. State*, 780 So.2d 918, 919 (Fla. 1st DCA 2001), a final Florida court upheld a conviction for robbery by force based upon testimony of the victim "that her assailant 'bumped' her from behind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred," and did not fall.

Had the Fourth and Sixth Circuits considered the above Florida decisions – and compared them to those they considered in *Gardner*, *Winston*, and *Yates* – these circuits would likely have recognized that a Florida statutory robbery (just like a North Carolina common law robbery, a Virginia common law robbery, and an Ohio statutory robbery) requires only minimal force to overcome victim resistance. And for that reason, these circuits – like the Ninth Circuit – would likely have found Mr. Bannister's robbery convictions were no longer ACCA "violent felonies."

Notably, it has always been the law in Florida (as in North Carolina, and other common law robbery states) that the degree of force used in a robbery is "immaterial." *Montsdoca v. State*, 93 So.157, 159 (Fla. 1922). And, as the Fourth Circuit recognized in *Gardner*, a standard requiring that force overcome resistance, but reaffirming that the degree of force used is "immaterial," suggests that so long as a victim's resistance is slight, a defendant need only use minimal force to commit a robbery. The standards in *Sawyer* and *Montsdoca* are similarly worded and functionally indistinguishable.

Plainly, the act of peeling back the victim's fingers in *Sanders* is functionally equivalent to the act of pushing away the victim's hand in *Chance*. Both acts allowed

the defendants to overcome the victim's resistance and remove the cigarettes (in *Chance*) and the cash (in *Sanders*) from the victim's grasp. But neither act rises to the level of "*violent* force' required by *Curtis Johnson*. And plainly, the "bump" in *Hayes* is indistinguishable from the "bump" in *Grant*, and the "push" in *Eldridge*. If anything, the "push" in *Eldridge* was more forceful in that it caused the victim to fall onto shelves, while the victims in *Hayes* and *Grant* did not even fall.

Moreover, the "bump" in *Hayes* appears to involve even less than the "extent of resistance" in the Virginia *Jones* case – which was the defendant's "jerking" of the victim's purse, which caused her to "turn and face" the defendant, but was not strong enough to cause the victim to fall down. *Winston*, 850 F.3d at 685 (citing *Jones*, 496 S.E. 2nd at 669-670). And while the purse snatching accompanied by the jerking of the victim's arm in the Ohio *Boggess* case is analogous to the purse snatching that the Fourth Circuit found insufficiently violent in *Jones*, Florida law notably suggests that something even less than either a "bump" or the "jerking" of the victim's arm during a purse snatching – namely, such *de minimis* conduct as simply "jostling" a victim during a pickpocketing, *see Rigell v. State*, 782 So.2d 440, 442 (Fla. 4th DCA 2001)(approving LaFave's example) – will constitute sufficient "force" to "overcome resistance," take a person's property, and seal a Florida robbery conviction.

Reading *Montsdoca* as it read *Sawyer*, reasoning as it did in both *Gardner* and *Winston*, and consulting ***all*** of the pertinent Florida caselaw here, the Fourth Circuit would likely have come to the same conclusion as the Ninth Circuit did in *Geozos* on Florida robbery. It would have held that a Florida statutory robbery – despite the

fact that it necessitates overcoming some "victim resistance" – does not categorically require the use of "*violent* force" in every case, and thus falls outside the ACCA's elements clause. And based upon the reasoning in *Yates*, it is likely the Sixth Circuit would have so concluded as well.

The Eleventh Circuit's complete disregard of Florida caselaw, its presumptive approach to the "overcoming resistance" issue, and its contrary conclusion in *Fritts* thus places it in conflict with not simply one, but at least three other circuits at this time.[6] And notably, the only court that has even somewhat aligned itself with the presumptive approach of Eleventh Circuit, is the Tenth. In *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017), the Tenth Circuit – much like the Eleventh – resolved the "violent felony" question with "blinders" on. Rather than surveying the relevant Colorado appellate caselaw to determine the least culpable conduct under the Colorado robbery statute, and in particular, how the Colorado courts interpreted the "violence" element in their statute, the Ninth Circuit instead chose to defer to a dictionary definition of "violence." *See id.* at 1266-1268 (acknowledging that "Colorado remains committed to the common law definition of robbery," and defines the required the amount of force "consistent with the common law;" finding,

---

6 Until June 17th of this year, the Eleventh Circuit's approach in *Fritts* also conflicted with that of the Eighth Circuit in *United States v. Bell*, 840 F.3d 963, 965-967 (8th Cir. 2016) (holding that Missouri second degree robbery was not a "crime of violence" under the Guidelines), and *United States v. Swopes*, 850 F.3d 979, 981 (8th Cir. 2017)(following *Bell* to conclude that such a crime was likewise not a "violent felony" under the ACCA). However, on June 17th, the Eighth Circuit vacated *Swopes* and set that case for rehearing en banc. The case was recently argued to the en banc court. It has not yet been resolved.

however, that Colorado statutory robbery remains an ACCA "violent felony" due to the Colorado Supreme Court's statement in *People v. Borghesi*, 66 P.3d 93, 99 (Colo. 2003) that "there can be no robbery without violence, and there can be no larceny with it;" finding the dictionary's definition of "violent" dispositive, rather than surveying the true meaning of "violence" according to Colorado appellate court decisions), *pet. for cert. filed* April 4, 2017 (No. 16-8616).

Like the Eleventh Circuit in *Fritts*, the Tenth Circuit in *Harris* refused to delve beneath the surface of that statement in *Borghesi*, and recognize that "violence" was simply a common law term of art with a unique meaning. Indeed, the Tenth Circuit summarily rejected the defendant's argument that given *People v. Davis*, 935 P.2d 79, 84 (Colo. App. 1996), where a Colorado court held as a matter of first impression that a purse snatching satisfied the "overcoming resistance" requirement of robbery, if the force was "of an extent that the victim is unable to retain control," the Colorado Supreme Court might not have meant literal "violence" when it later used the term "violence" in *Borghesi*. Rather than acknowledging that the least culpable conduct under the statute was established in *Davis* – and deferring to *Davis* as *Moncrieffe* and *Mathis* dictate – the Tenth Circuit instead deferred to the dictionary definition of "violent." *Id.*

Had the Tenth and Eleventh Circuits strictly applied the categorical approach as it has been clarified by this Court's recent precedents, and carefully analyzed the relevant state appellate caselaw as the Fourth Circuit did in *Gardner* and *Winston* and the Sixth Circuit did in *Yates*, the Tenth and Eleventh Circuits would have

concluded that neither Colorado robbery nor Florida robbery are categorically violent felonies under the ACCA. The Eleventh Circuit made unwarranted assumptions in *Fritts* as to the level of force required to overcome resistance. Not only did the court disregard the common law roots of this requirement; it disregarded that the Florida courts' interpretation of "overcoming resistance" to this day has been consistent with the approach at common law: the degree of force used is "immaterial." As the Ninth Circuit correctly noted in *Geozos*, neither the *Lockley* panel nor the *Fritts* panel – nor any subsequent panel of the Eleventh Circuit for that matter – has ever considered how the Florida courts interpret the "overcoming resistance" element in Fla. Stat. § 812.13(1), and that the Florida courts do not require any more than slight force to "overcome resistance" if the resistance itself is slight.

C. The questions raised by this case are important for multiple reasons, and should be resolved by the Court forthwith.

Resolution of the above conflicts will have far reaching impact not only for Mr. Bannister and other Eleventh Circuit defendants, but for Tenth Circuit defendants as well. And the impact will be felt not only by defendants convicted of Florida or Colorado robbery in other circuits, but potentially by any defendant with a common law robbery conviction or a statutory robbery conviction based on common law robbery. Plainly, until this Court definitively resolves both the narrower and broader circuit conflicts outlined above, other courts might follow the erroneous reasoning in *Fritts* or *Harris* and defendants in other circuits will be prejudiced.

Indeed, that has already occurred in the Fourth Circuit, albeit in an unpublished decision. Specifically, in *United States v. Orr*, 685 Fed. Appx. 263 (4th Cir. April 21, 2017), *pet. for cert filed* Nov. 1, 2017 (No. 17-6577), a panel of the Fourth Circuit deferred to the *Fritts* and *Lockley* on the question of whether a Florida robbery was an ACCA violent felony, rather than carefully surveying Florida caselaw to determine on its own whether violent force was required to overcome resistance in every Florida robbery case. *Id.* at 265. The *Orr* panel declined to conduct its own survey simply because the Eleventh Circuit in *Fritts* had "confirmed the continuing validity of *Lockley*'s holding, even in light of more recent developments." *Id.*

Taking its lead from *Fritts*, the *Orr* panel miscited *Robinson* as confirming that the "weight of the caselaw" requires more than *de minimis* force for a robbery. *Robinson*, however, simply confirmed that more force is required for a strongarm robbery in Florida than for a robbery by sudden snatching (in which there is no resistance). While *Robinson* did clarify that resistance – and force to overcome it – was an element of *any* robbery case, *Robinson* did **not** attempt to articulate the "degree" of force necessary to overcome resistance in *every* Florida robbery case. Both the *Fritts* panel – and the *Orr* panel (following *Fritts*) – confused the issue and missed that distinction. The only way that the Fourth Circuit could have actually determined whether *violent* force was necessary to overcome resistance in every Florida robbery case, or whether slight non-violent force might suffice, would have been to conduct an exhaustive review of Florida caselaw, similar to the review of

North Carolina caselaw it conducted in *Gardner* and that of Virginia caselaw it conducted in *Winston*. But instead of conducting such a review in Orr's case, and deferring to the Florida courts' interpretation of the "overcoming resistance" element as the Ninth Circuit did in *Geozos*, the Fourth Circuit took the easier route: it deferred to the Eleventh Circuit in *Fritts*.

Beyond the necessity of preventing any further prejudice from *Fritts*, and eliminating the many unwarranted sentencing disparities that have already resulted from that decision, a grant of certiorari in this case would be important for another reason. In the three decades that have passed since Congress amended the original version of the ACCA to delete "robbery" and "burglary" as automatic ACCA predicates, replacing those two specific crimes with broader "violent felony" definitions designed to better target the most dangerous gun offenders, the Court has granted certiorari multiple times to determine whether state burglary offenses were proper ACCA predicates. *See, e.g., Taylor v. United States*, 495 U.S. 575 (1990); *James v. United States*, 550 U.S. 192 (2007); *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (2013); and *Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243 (2016). But in three full decades, during which robbery has remained one of the most common offenses used for ACCA enhancements, the Court has never considered whether *any* state robbery conviction fell within either the elements or residual clause definitions of "violent felony." With the elimination of the residual clause, and the recent swirl of litigation that has surrounded the only remaining definition of "violent felony" left in the ACCA, the time has come.

This Court is the only hope for Eleventh Circuit defendants like Mr. Bannister who will remain bound by *Fritts* to serve greatly enhanced ACCA sentences which identically-situated defendants in other circuits will not serve, simply because the Eleventh Circuit will not reconsider either its prior "precedential" decisions, or governing Florida law. And indeed, the instant petition presents the Court with an excellent vehicle to resolve the circuit conflict, for several reasons. Mr. Bannister requested the district court to follow *Benitez-Saldana* – the precise Florida appellate decision that convinced the Ninth Circuit that a Florida robbery does not necessitate "violent force," and resulted in the direct conflict between the Eleventh and Ninth Circuits. If, however, the Court believes that *Stokeling*, *Conde*, or any other currently-pending petition presents a better vehicle for certiorari, Mr. Bannister asks that his own case be held pending resolution of the common issues these cases share.

CONCLUSION

The circuit conflicts that currently exist on both questions presented are untenable. The disparate treatment of similarly-situated defendants is inequitable, and must come to an end. The Court should grant the writ.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____
Chantel R. Doakes
Assistant Federal Public Defender
Counsel for Jerome Bannister

Fort Lauderdale, Florida
March 26, 2018